RECORD AND BRIEFS

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No. 142, Original

IN THE

Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

On Exceptions To The Report Of The Special Master

GEORGIA'S REPLY TO FLORIDA'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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INTRODUCTION

In this equitable apportionment action, Florida asks the Court to impose dramatic and costly reductions in Georgia's upstream water use—cuts that threaten the water supply of 5 million people in metropolitan Atlanta and risk crippling a multi-billion dollar agricultural sector in southwest Georgia. To justify such draconian restrictions, Florida was required to show, at the very least, that these potentially catastrophic cuts would yield some meaningful benefit to Florida. But after 18 months of discovery and a five-week trial, Florida could not prove that the water generated by its proposed reductions would actually flow across the state line during the drought periods when Florida claims to have suffered injury. After reviewing the evidence in detail, the Special Master found any benefit to Florida from its proposed cuts to be "uncertain and speculative." Report 48. It is thus no surprise that the Special Master recommended that this Court deny Florida's claim, which is precisely what this Court's precedents require.

At issue in this case is the water of the Apalachicola-Chattahoochee-Flint River Basin ("ACF Basin"), a network of rivers, dams, and reservoirs that begins in northern Georgia and ends in the Florida panhandle. Among the reservoirs and dams are five facilities owned and operated by the U.S. Army Corps of Engineers (the "Corps"), through which the Corps controls the timing and flow of water at the Georgia-Florida line. A panoply of federal statutes and regulations directs the Corps' management of ACF waters, particularly in periods of drought or low flows. In those conditions, the

Corps must balance available water resources to achieve multiple federally mandated purposes, including conserving water in its reservoirs and satisfying minimum state-line flows into Florida. Because the Corps, in effect, controls the spigot at the state line, it plays a critical role in managing water throughout the region. The United States, however, declined to waive sovereign immunity, and as a result it could not be joined as a party and cannot be bound by an order of the Court in this case.

From the outset of this case, Georgia has taken the position that the Court could not fashion adequate relief without the United States as a party. In an effort to avoid dismissal on this ground, Florida narrowly tailored its requested relief to focus solely on Georgia. Florida insisted that a consumption cap on Georgia alone would lead to an increase in water flow across the state line—*wholly irrespective of Corps operations*—sufficient to redress its alleged injuries. The Special Master allowed the case to proceed on that basis, but warned Florida that its approach was a "two edged sword." 6/19/15 Order 13 (Dkt. #128). "Having voluntarily narrowed its requested relief and shouldered the burden of proving that the requested relief is appropriate, it appears that Florida's claim will live or die based on whether Florida can show that a consumption cap is justified and will afford adequate relief." *Id.*

Florida failed to make that showing. Indeed, far from proving that it could obtain a meaningful increase in state-line flows during drought *without* an order changing Corps operations, the evidence showed just the opposite: any meaningful benefit to

Florida from a cap on Georgia's water use would be highly unlikely *because of* Corps operations. The United States, participating as *amicus curiae*, told the Special Master: "Apalachicola River flows would be very similar with or without a consumption cap" during droughts because additional water generated by a cap would be stored in upstream reservoirs by the Corps until those reservoirs refilled and would not be passed on to Florida. U.S. Post-Trial Br. 17-18 (Dkt. #631). That conclusion was fully supported by the trial record, which included extensive testimony, data, and expert analysis. The Special Master thus correctly found that "Florida has failed to show that a consumption cap will afford adequate relief." Report 69.

In reaching that conclusion, the Special Master correctly held Florida to the exacting burden of proof that this Court has imposed on states seeking to upend the status quo at the expense of a coequal sovereign. Unless Florida could "demonstrate[] by clear and convincing evidence that the benefits of the diversion [it sought] substantially outweigh[ed] the harm that might result," it could not prevail under this Court's decisions. *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982) (*Colorado I*). It is thus wrong for Florida to claim that the Special Master applied some "unprecedented" legal standard. Exceptions 25. Relying on this Court's equitable apportionment cases, he appropriately required Florida to prove by clear and convincing evidence that its proposed consumption cap would generate a meaningful benefit to Florida that would effectively redress its alleged injuries. When he found that Florida had failed to meet its burden of proof on that score, he

recommended that relief be denied. That recommendation is fully supported by this Court's precedents. *See, e.g.*, *Washington v. Oregon*, 297 U.S. 517, 522-23 (1936); *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 392 (1980) (*Idaho I*); *Colorado I*, 459 U.S. at 187.

Having failed to prove its case at trial, Florida mischaracterizes the record in an attempt to earn a do-over from this Court. Florida repeatedly claims, for example, that the Special Master required Florida to prove that complete redress was "guarantee[d]." Exceptions 29. But the Special Master applied no such standard. He instead asked whether Florida had proven its asserted benefit by "clear and convincing evidence." Report 3, 28, 70. Florida also claims that the Special Master "*found* both injury and inequitable conduct," Exceptions 2 (emphasis added), when the Special Master expressly declined to reach those issues and limited his findings to the "single, discrete" issue of redressability, Report 30. And Florida selectively quotes from a recent Corps document to argue that relief is likely, omitting key passages in which the Corps made clear that it is not a party to this case, that its operations are not at issue, and that it would merely review and consider any final order. Such distortions of the record below only underscore Florida's fundamental failure of proof.

At bottom, Florida's brief amounts to a plea for this Court to cut Georgia's water use *regardless* of whether those cuts would actually redress any injury. But an equitable apportionment is not an exercise in futility. This Court will not afford relief "for no other or better purpose than to vindicate a

barren right." *Washington*, 297 U.S. at 523. That is all the more true given that Florida's proposed consumption cap would impose hundreds of millions of dollars of costs on Georgia annually, upsetting long-existing uses on which millions of Georgians rely. Having intentionally narrowed its requested relief to exclude the Corps, Florida must now shoulder the consequences of that choice. Because Florida failed to prove by clear and convincing evidence that the relief requested would—wholly independent of the Corps—redress its alleged injuries, this Court should accept the recommendation of the Special Master.

STATEMENT OF THE CASE

A. Background

The ACF Basin consists of a network of rivers, dams, and reservoirs that the Corps has described as a "highly regulated system." GX-544 (Corps, *ACF Final Updated Scoping Report* (Mar. 2013)) at 2. The Chattahoochee River rises in northern Georgia and flows south to the Florida border. Report 4. Along the way, it passes through five dams operated by the Corps, three of which create reservoirs that have substantial capacity to store water from the wet winter and early spring for release during the drier summer and fall. GX-544 at 4-8. Buford Dam is the northernmost of the Corps' five dams and is located about 40 miles north of Atlanta. The reservoir created by Buford Dam is Lake Lanier, the largest of the five reservoirs managed by the Corps in the ACF Basin. The Corps has long operated Buford Dam and Lake Lanier in a manner that provides primary water supply for the Atlanta metropolitan region.

Report 36; Mayer Direct ¶ 22 (Dkt. #567). Further downstream, the Chattahoochee passes through the West Point, Walter F. George, George W. Andrews, and Jim Woodruff Dams. Report 6. Woodruff Dam, located on the Georgia-Florida border, is the southernmost of the Corps' five dams in the ACF Basin. *Id.*

The Flint River originates just south of Atlanta. Along with a system of highly productive groundwater aquifers, the Flint River serves as a source of irrigation for southwestern Georgia's fertile agricultural region, which generates at least four billion dollars annually in farm-based revenue. Report 5; Stavins Direct ¶ 17 (Dkt. #572). The Flint River joins the Chattahoochee River at Lake Seminole, the reservoir created by Woodruff Dam. The Apalachicola River begins on the southern side of Woodruff Dam and flows exclusively through sparsely populated portions of the Florida panhandle, terminating at the Apalachicola Bay. Report 5.

Flows from Georgia into the Apalachicola River "reflect the downstream end-result of system-wide operations" by the Corps. JX-72 (U.S. Fish and Wildlife Service, *Biological Opinion*) at 7. No water can flow into the Apalachicola River from *either* the Chattahoochee River *or* the Flint River without passing through the Corps' reservoir system, including Woodruff Dam. Because Lake Seminole does not have significant storage capacity, the Corps regulates flows into the Apalachicola River during times of drought or low flows by scheduling releases from the federal dams further upstream. By coordinating those upstream releases, the Corps

ensures that Apalachicola River flows meet certain minimums. JX-124 (Corps, *Draft Environmental Impact Statement* (Oct. 2015)) at 2-65. Although the Corps does not operate any dams on the Flint River upstream of Woodruff Dam, the Corps takes Flint River flows into account in determining how much water to release from upstream dams on the Chattahoochee River. *Id.* at 4-24 (inflows to Lake Seminole from the Flint River are calculated as part of total "basin inflow," one of the three key factors controlling releases from Woodruff Dam).

Congress has specified the manner in which the Corps must operate the federal dams and reservoirs in the ACF Basin. In particular, the Corps is statutorily required to regulate lake levels and water flows in the Basin to serve a number of federal statutory purposes, including water supply, hydroelectric power generation, flood control, recreation, navigation, fish-and-wildlife conservation, and water quality.[1] When balancing these sometimes-competing federal objectives, the Corps "does not prioritize project purposes with the exception of flood risk management during a flood event." JX-124 at 4-6. Rather "[a]ll project purposes ... are considered equally when making water management decisions." *Id.* As the Corps explained in a March 2013 report:

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[1] *See, e.g.* H.R. Doc. No. 76-342 (1939); River and Harbor Act of 1945, Pub. L. No. 79-14, § 2, 59 Stat. 10, 17; River and Harbor Act of 1946, Pub. L. No. 79-525, § 1, 60 Stat. 634, 635; Water Supply Act of 1958, 43 U.S.C. § 390b; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e; Flood Control Act of 1962, Pub. L. No. 87- 874, § 203, 76 Stat. 1173, 1182.

> The complex hydrology and varied uses of the ACF system require that the [Corps] operate the system in a balanced operation in an attempt to meet all the authorized purposes while continuously monitoring the total system's water availability to ensure that minimum project purposes can be achieved during critical drought periods.

GX-544 at 18.

In managing water resources in the ACF Basin to serve these purposes, the Corps uses a Master Water Control Manual. That Manual—recently updated by the Corps following a nearly decade-long, multi-agency administrative review process—sets forth the Corps' considered views on how to operate its dams and reservoirs in a way that "best balances the authorized project purposes," JX-124 at ES-16, and "best serves the overall public interest," Corps, *ACF Signed Record of Decision*, at 1 (Mar. 30, 2017) (*Record of Decision*), http://bit.ly/2sSRdp6.[2] In general, the Corps calculates how much water to release from its reservoirs based on the time of year, the total combined volume of usable water in its reservoirs ("composite conservation storage"), and the amount of water that would flow by Woodruff Dam if the reservoirs were kept at their current storage levels

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[2] The Corps released its current Manual in December 2016, after the trial in this case but before the Special Master's Report. The Special Master found—and Florida does not dispute—that the new Manual did not result in "any material changes to Corps operations from the operations described by the parties at trial." Report 35-36 n.29.

("basin inflow"). Report 42-43, 45-46; U.S. Post-Trial Br. 5-12.

Of particular relevance here, the Manual establishes a series of minimum flow rates for water passing through Woodruff Dam and into Florida. JX-124 at 5-35. These minimum flow rates ensure that water flowing into the Apalachicola River generally does not fall below 5,000 cubic feet per second ("cfs"), with the Corps supplementing natural basin flows with water from its reservoirs when necessary to maintain that minimum.[3] Report 45 n.36, 48. The 5,000 cfs minimum applies during "drought operations," which are triggered when reservoir storage levels drop below a certain threshold, and "low-flow conditions," which occur any time basin inflow drops below 5,000 cfs. *Id.*

During drought operations, "any [flows] above 5,000 cfs can be stored" by the Corps to promote recovery of reservoir storage levels. U.S. Post-Trial Br. 17. Once drought operations are triggered, the Corps continues those operations until the reservoirs recover to almost full capacity. *Id.* at 9-10. The purpose of drought operations (and the 5,000 cfs minimum flow that applies during those operations) is to "conserve storage in [Corps] reservoirs," JX-124 at ES-8, while also "ensur[ing] that minimum project purposes can be achieved during critical drought periods," GX-544 at 18.

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[3] On rare occasions, the 5,000 cfs minimum is lowered to 4,500 cfs. *See* Report 44; JX-124 at 6-79.

B. Procedural History

For more than two decades, Florida blamed the Corps for the alleged ecological harms that it now attempts to pin on Georgia. In a series of cases, Florida claimed that the Corps' practice of retaining water in upstream reservoirs created "low-flow conditions" that "le[d] to devastating consequences for the ecology and species of the Apalachicola River and Bay." GX-402 at 29 (Fla. Cert. Petition, *In re MDL-1824 Tri-State Water Rights Litig.* (U.S. No. 11-999) (filed Feb. 1, 2012)); *see also* GX-1281 ¶ 10 (Suppl. Decl. of T. Hoehn, *Alabama v. U.S. Army Corps*, No. cv-90-be-1331 (N.D. Ala. Apr. 10, 2006)) (Florida official stating that "the Corps has been retaining water in the upstream reservoirs, primarily Lake Lanier, while reducing releases to the Apalachicola River"). Florida also claimed that Corps activities on the Apalachicola River (such as dredging and dam construction) caused "changes in River morphology and hydrology" that "reduce[d] dramatically the area of available habitat inundated." GX-1283 ¶ 65 (Compl., *Florida v. U.S. Fish & Wildlife Serv.*, No. 4:06-cv-410 (N.D. Fla. Sept. 6, 2006), ECF No. 1-2).

Although Florida for years argued that its alleged ecological injuries were caused by the Corps and could be redressed by a judicial order requiring the Corps to release more water from its upstream reservoirs, it was ultimately unsuccessful in its litigation against the Corps. Florida thereafter brought this equitable apportionment action, blaming Georgia for the same alleged injuries for which it previously had blamed the Corps.

At the outset of the case, Georgia filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(7), challenging Florida's ability to proceed without the United States being joined as a party. Dkt. #48. Florida resisted, arguing that the United States was not a required party because Florida could obtain meaningful redress by capping Georgia's water consumption without any changes to Corps operations. Dkt. #75. Florida acknowledged that it bore the burden of proving that its injuries could be redressed without the Corps as a party, and told the Special Master that "if you conclude after a trial that caps on consumption will not redress Florida's harm, then Florida will not have proved its case." 6/2/15 Hr'g Tr. 29:21-30:5 (Dkt. #125). The Special Master allowed the case to proceed, but warned that Florida's claims would "live or die based on whether Florida can show that a consumption cap is justified and will afford adequate relief." 6/19/15 Order 13.

Florida had more than 18 months of discovery to assemble evidence to try to meet its burden of proof. During that time, the parties produced 7.2 million pages of documents, served 130 third-party subpoenas, submitted *Touhy* requests on 7 federal agencies, conducted 69 fact depositions, issued more than 30 expert reports, and conducted 29 expert depositions. The issue of whether a consumption cap would afford Florida adequate relief was a prominent and recurring topic throughout discovery. The Corps produced documents and provided its views on Corps operations in a post-trial *amicus* brief. Further, both parties had access to the extensive public record of official Corps statements concerning operations in the ACF Basin. Florida deposed Georgia employees

knowledgeable about Corps operations as well as numerous third parties who study Corps operations. Florida also retained three experts to opine on how the Corps manages the ACF system. For its part, Georgia relied on testimony from a retained expert on Corps reservoir operations and the State's chief hydrologist, whose job requires a thorough understanding of Corps operations.

1. The Trial

Following discovery, the Special Master held a five-week bench trial. The parties presented evidence on a multitude of issues, including Georgia's use of water in the ACF Basin; the nature, severity, and causes of Florida's alleged injuries; the burdens a consumption cap would impose on Georgia; and whether a consumption cap would provide adequate relief to Florida in light of Corps operations.

The Special Master expressly limited his recommendation to the last issue—effective redress—and only that issue is germane to the dispute before the Court. Florida, however, devotes a large portion of its brief to discussing other matters, even going so far as to claim that the Special Master "found" in Florida's favor on issues such as "injury and inequitable conduct." Exceptions 2; *see also id.* at 4-17. Because Florida has addressed those irrelevant matters, Georgia is compelled to respond, if only to briefly highlight the substantial amount of evidence that Florida omitted. These issues, however, should not distract from the primary issue here—namely, that Florida failed to

prove the availability of effective relief in the absence of the Corps as a party.

(A) Georgia's Use Of Water In The ACF Basin Is Equitable

Georgia uses ACF waters for highly beneficial purposes. Among other things, the Georgia portion of the ACF Basin provides the primary water supply for more than 5 million people and supports a multi-billion dollar agricultural industry. Stavins Direct ¶¶ 14-20; Mayer Direct ¶ 22; Kirkpatrick Direct ¶¶ 9, 11 (Dkt. #564). Georgia is home to over 90% of the population, employment, and economic activity in the ACF Basin. Stavins Direct ¶¶ 30, 33; Mayer Direct ¶¶ 27-28; GX-863, Att. A at 2. Florida, by contrast, accounts for only 1.8% of the population, 1.2% of employment, and less than 1% of economic activity in the Basin. Stavins Direct ¶ 30.[4]

Although it is home to the overwhelming majority of the Basin's population and economic activity,

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[4] Florida's extended critique of Georgia's agricultural irrigation practices, *see* Exceptions 14-17, is neither relevant to the issue decided by the Special Master nor accurate. Florida's own expert found that the great majority of Georgia farmers under-irrigate, applying less water than their crops require for maximum yield. Tr. 2822:23-2823:8 (Sunding). Georgia has invested millions of dollars in conservation measures to reduce agricultural water use. *See* Masters Direct ¶¶ 51-69 (Dkt. #566) (describing "substantial" investments in regional water planning and efficient irrigation practices); Cowie Direct ¶ 43 (Dkt. #562) (describing investment of nearly $30 million for regional water planning). Georgia also placed a moratorium on new irrigation permits from 1999 to 2006, and again from 2012 to the present, in areas where irrigation can impact streamflow. *See* Reheis Direct ¶ 47 (Dkt. #571); Tr. 3060:24-3061:7 (Turner).

Geogia consumes only a small fraction of the water available in the ACF system. In most years, Georgia's consumptive water use accounts for less than 5% of total flow crossing the state line. Bedient Direct ¶ 95 (Dkt. #559). Even at times of peak water use—*i.e.*, during the drier May-September months—Georgia's consumptive use averages only around 8% of state-line flow. *Id.* ¶ 97. Thus, under almost all climatic conditions, Florida recieves over 90% of total surface water in the ACF Basin. And even during times of drought, the Corps guarantees flows to Florida of at least 5,000 cfs, Report 44—an amount Florida itself noted is "enough water both to supply approximately 19 million people and irrigate approximately four million acres of farmland." Dkt. #474 at 3.

(B) Florida Failed To Prove That Georgia's Water Use Caused Harm To The Apalachicola River And Bay

The evidence at trial also undermined Florida's attempts to blame Georgia's water use for alleged injuries to the Apalachicola River and Apalachicola Bay. With regard to the Apalachicola River, Florida argued that Georgia's water use harmed the ecosystem by reducing the amount of water escaping the banks of the river and moving into the floodplain. Prior to trial, however, the U.S. Fish and Wildlife Service issued a Biological Opinion pertaining to the Apalachicola River, which concluded that the two primary river species Florida alleged to have been harmed by Georgia were either stable or improving in population size. *See* JX-168 at 63 (sturgeon); *id.* at 119, 133 (mussels). Florida's own river ecology

expert, moreover, could not identify population reductions in any animal species in the river or floodplain. *See* Tr. 547:11-548:1 (Allan). And to the extent there has been any reduction in floodplain inundation on the Apalachicola River, the evidence conclusively showed that such reductions were caused not by Georgia's water use, but by changes in the physical characteristics of the river caused by dredging, the construction and operation of dams, and drought. GX-1335 at 10 (Florida's expert reporting that "[d]egradation of the river bed and channel widening of the river" caused by dam construction and dredging "has decreased connectivity to the floodplain and slough channels"); Tr. 166:1-4 (Hoehn) (admitting that Corps operations caused "clear impacts on the ACF species"); JX-124 at 2-7 to 2-9 (drought).

Similarly, the evidence at trial showed that any harm to the Apalachicola Bay ecosystem was not caused by Georgia. Florida blamed Georgia's water use for the 2012 collapse of the Apalachicola Bay oyster fishery. Before filing this case, however, Florida told the federal government that the oyster crash resulted from the confluence of "drought conditions" and "[h]arvesting pressures." JX-77 at 1-2. Testimony at trial confirmed that Florida (1) allowed unsustainable levels of oyster harvesting in the Bay in 2010 and 2011, JX-50 at 3, 4-5; (2) opened Apalachicola Bay to unrestricted harvesting and overfishing following the *Deepwater Horizon* oil spill, a step that Florida officials described as a "use it or lose it" policy, JX-77 at 8; (3) failed to restore oyster habitat while this overharvesting was occurring, Tr. 4397:18-4398:7 (Lipcius); and (4) failed to enforce

size and bag limits in the Bay, which led to substantial overharvesting of juvenile and undersized oysters, FX-412 at NOAA-3818; Tr. 1137:4-15 (Beaton). Indeed, Florida regulatory oversight was so lax that more oysters were harvested in 2011 and 2012 than in any of the prior 25 years. GX-1248; FX-839.[5]

The evidence also undermined Florida's claims of harm to the Bay ecosystem more broadly. Historical population data showed no harm to any of the non-oyster species prevalent in Apalachicola Bay, including numerous species of fish, crab, shrimp, and plants. Tr. 4234:18-4235:18 (Menzie). Florida's own expert, moreover, admitted that she had no "data or information indicating that any fish species in Apalachicola Bay has been negatively impacted by impaired food availability" as a result of low flows. Tr. 1852:7-11 (Glibert); Tr. 1850:6-12 (Glibert) (same for blue crab and white shrimp).

Significantly, Florida's evidence focused on alleged injury during dry or drought years only;

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[5] The Special Master stated that the evidence "tends to show" that the oyster collapse was caused by increased salinity in the Bay, which in turn was caused by low flows from the Apalachicola River. Report 32. Georgia strongly disagrees with that statement, which conflicts with the findings of University of Florida scientists. GX-789 at 6 ("We did not find correlations between Apalachicola River discharge measures ... and our estimated relative natural mortality rate ... or oyster recruitment rates[.]"). In any event, the Special Master did not go the next step and say that Georgia's water use—as opposed to drought, Corp operations, or other influences—was the *cause* of those low flows; to the contrary, he specifically reserved ruling on the question of causation. Report 34.

Florida presented no meaningful evidence that it was suffering injury during average or wet years. Tr. 2811:1-8 (Sunding). This is consistent with what Florida previously told another federal court: "[I]n years of at least average annual flows, the Apalachicola River's flows are more than adequate to ... sustain the significant biological processes on which the health of the River and Apalachicola Bay relies, and upstream consumption is not significant enough to interfere with those processes." Decl. of D. Barr ¶ 31, *In re Tri-State Water Rights Litig.*, 3:07-md-1-PAM-JRK, Dkt. #311-4 (Dec. 9, 2009).

(C) Florida's Proposed Consumption Cap Would Inflict Enormous Economic Burdens On Georgia

Notwithstanding its inability to tie Georgia's water use to its alleged injuries, Florida asked the Special Master to impose draconian restrictions on Georgia's consumption. Although Florida labeled this requested relief a "consumption cap," it would in fact require drastic cuts to Georgia's water use. For example, Florida proposed to cut Georgia's water use by an amount sufficient to generate an additional 2,000 cfs of streamflow in summer months, principally by cutting agricultural water use on the Flint River. Florida Post-Trial Br. 78 (Dkt. #630). That would be, quite literally, impossible. Georgia's *total* consumptive water use in the Basin has never reached a monthly average of 2,000 cfs, and has exceeded 1,400 cfs only during the most extreme drought months. Zeng Direct ¶¶ 5, 22-23 (Dkt. #574). Florida greatly overstates how much water could be generated from a consumption cap because its estimates of Georgia's water use, which purport to

show "exploding consumption" since the 1970s, *see* Exceptions 8-9, exaggerate the impact of Georgia's water use by as much as *10 times* its actual amount, Tr. 3308:1-14 (Zeng).

Setting aside the factual impossibility of Florida's proposed cap, the cuts Florida says are necessary to achieve an additional 2,000 cfs of streamflow would impose extraordinary costs on Georgia. Georgia's economic expert found that just one of those measures—reducing irrigation for row crops—would cost Georgia over $335 million in lost crop yields every year the reductions were implemented. Tr. 4512:20-4514:4 (Stavins). Those same cuts also would reduce state-wide economic activity in Georgia by another $322 million. Stavins Direct ¶ 90. Florida's own expert testified that generating just half of Florida's proposed remedy (1,000 cfs) would result in direct costs to Georgia of approximately $190 million every year the cuts were implemented. Tr. 2787:10-13 (Sunding). And notwithstanding these staggering costs, Florida even argued that Georgia should spend over a billion dollars on new urban wastewater infrastructure, Tr. 3551:9-3552:6 (Mayer), even though Georgia has already invested hundreds of millions of dollars to develop conservation programs that have substantially reduced consumptive use in the Atlanta region, Mayer Direct ¶¶ 36, 80-82.

(D) A Consumption Cap Would Not Provide Effective Relief

A significant focus of the trial was on whether a consumption cap on Georgia would result in more water flowing to Florida during drought operations,

when the Corps' operating plans call for conserving reservoir storage while requiring only a minimum flow of 5,000 cfs into Florida. Both States' experts ran simulations using ResSim—the Corps' official reservoir simulation model, which incorporates the operating rules from the Water Control Manual. Those simulations showed that "additional water entering the ACF Basin and resulting from Georgia's reduced consumptive use would not translate to any increase in flow at the state line during these critical low flow months, due to the manner in which the Corps operates its reservoirs." Bedient Direct ¶ 81; Tr. 1933:20-1935:23 (Hornberger) (Florida expert acknowledging that ResSim modeling showed that "a 50 percent reduction in Georgia's agricultural use ... would produce zero cfs of additional flow at the state line" for hundreds of days during drought). Those simulations were consistent with historical flow records, which show that Flint River flows can naturally fluctuate by as much as 2,000 cfs during drought (due to rainfall and other localized weather events) without any meaningful change in state-line flows. Tr. 3342:7-3343:19 (Zeng).

Testimony at trial explained why a consumption cap would not translate into increased state-line flows during drought operations and low-flow periods. The Water Control Manual instructs the Corps to conserve reservoir storage when water is scarce. Thus, if additional water enters the system during drought as a result of cuts to Georgia's water use, that additional water would not be passed through to Florida. Instead, the Corps would use that water to refill its reservoirs, while maintaining a roughly 5,000 cfs flow into Florida. That is true

even with respect to any streamflow that might be generated through cuts to water use on the Flint River. Although water generated by cuts on the Flint River cannot directly be captured and stored, the Corps would effectively place that water into storage by "offsetting" increased Flint River flows with decreased releases from upstream reservoirs on the Chattahoochee of roughly the same magnitude. Tr. 3340:12-3343:19 (Zeng). "As a result, during drought or low-flow periods, increases in Flint River flow would generally not lead to any increases in state-line flow into Florida." Bedient Direct, ¶ 47; *see also* Tr. 3341:24-3342:6 (Zeng).

The United States confirmed that, in periods of drought or low flows, a consumption cap would not generate additional state-line flow. In its post-trial *amicus* brief, the United States explained that "the Corps will 'offset' additional basin inflow from the Flint River by storing more water on the Chattahoochee River" during drought operations or low-flow periods. U.S. Post-Trial Br. 12, 17-18. According to the United States, any increased flows generated on the Flint River during these times "would generally result in a net increase in storage upstream"—not increased flows into Florida. *Id.* at 13. All the while, the Corps would "maintain[] flow into Florida of roughly 5,000 cfs." *Id.* The United States made clear that increases in Flint River flows during dry months by as much as 2,000 cfs—a number far exceeding Georgia's maximum monthly water use in the ACF Basin—would not meaningfully increase flows into Florida. *Id.* at 17. As a result, during drought operations, "Apalachicola River flows would be very similar with or without a

consumption cap until enough water is stored to return the system to normal operations." *Id.* at 17-18. This "refilling" process, and thus drought operations, can last for months. *See* Bedient Direct ¶¶ 26, 29 (during the extreme drought of 2012-13, drought operations lasted 10 months).

Even if a consumption cap would meaningfully increase state-line flows during drought (which it would not), Florida's experts could not identify any material benefit such increases would have on the ecological injuries Florida alleges. For example, Florida's salinity expert found that, even if all of the water saved by a consumption cap somehow made its way to Florida, that additional water would have decreased salinity in Apalachicola Bay by less than 1 part per thousand in 2012—a *de minimis* amount that would have produced no ecological benefit. Greenblatt Direct at Att. 1 (Dkt. #572); Tr. 1775:7-1776:15, 1778:20-1779:1 (Greenblatt). Another of Florida's experts found that significant cuts in Georgia's water use would produce at most a 1.2% "maximum difference in the population" of oysters at the major oyster bars. Tr. 4409:24-4411:2 (Lipcius); Tr. 1724:24-1725:14 (White). Florida presented no evidence showing how such a minor change could result in meaningful ecological benefits.

2. The Special Master's Report

Although Florida claims throughout its brief that the Special Master made "findings" with respect to other issues—such as Florida's injury and the nature of Georgia's upstream water use—the Special Master in fact limited his Report to a "single, discrete issue." Report 30. Even "assuming" Florida could prove the

other elements necessary to obtain an equitable apportionment, the Special Master found that Florida "has not proven that its injury can be remedied" without a decree binding the Corps because the "evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party." *Id.* at 31.

The Special Master divided his analysis between (1) low-flow and drought periods; and (2) normal and wet periods. First, with respect to low-flow and drought periods, the Special Master found that "Florida has not proven by clear and convincing evidence that any additional streamflow in the Flint River or in the Chattahoochee River would be released from Woodruff Dam into the Apalachicola River at a time that would provide a material benefit to Florida." *Id.* at 47. This was due to "the Corps' operations of federal reservoirs," which "render[ed] any potential benefit to Florida from increased streamflow in the Flint River uncertain and speculative." *Id.* at 47-48. The Special Master found that "ensuring relief for Florida during these [dry periods] would require modification of the rules governing the Corps' reservoir operations and, hence, active participation by the Corps in this proceeding." *Id.* at 61-62.

Second, with respect to normal and wet periods, the Special Master found a complete failure of proof on Florida's part: "Florida presented no evidence assessing the impact of a consumption cap on shortening the Corps' drought operations or on increased pass-through flows during non-drought conditions." *Id.* at 65. And "[e]ven if there were

evidence of harm from other than low-flow conditions, Florida did not provide substantial evidence of the benefits (if any) from increased overall flows." *Id.* "Florida's lack of proof, combined with the credible testimony offered by Georgia," led the Special Master "to conclude that Florida has not carried its burden to show that it can obtain meaningful redress without a decree that binds the Corps." *Id.* at 68-69.

The Special Master reserved ruling on any issue other than effective redress. He stated that, if Florida had not failed to meet its burden of proof on that issue, "[m]uch more could be said and would need to be said" about "the harm suffered by Florida," "Georgia's consumptive water use," "causation," and "other issues." *Id.* at 31, 34.

SUMMARY OF THE ARGUMENT

The Special Master correctly recommended that the Court deny Florida's request for an equitable apportionment. Florida failed to prove, by clear and convincing evidence (or any other plausible standard), that the relief requested would effectively redress its alleged injuries. To the contrary, the evidence showed that, because of the Corps' extensive regulation of the waters in the ACF Basin, any potential benefits to Florida from a consumption cap on Georgia would be either speculative or nonexistent. The Court should accept the recommendation of the Special Master.

I. The Special Master applied the correct legal standard in finding that Florida failed to prove its case. He asked whether Florida's requested relief (a consumption cap on Georgia) would effectively

redress Florida's alleged injuries without the Corps as a party. That inquiry is a necessary part of the equitable balancing analysis: without proving that its proposed relief would redress its alleged injury, Florida cannot establish (as it must) that "the benefits of the diversion substantially outweigh the harm that might result." *Colorado I*, 459 U.S. at 187.

Florida's contrary argument rests on a distortion of the Special Master's Report. The Special Master did not require Florida to prove to "a certainty" that a decree would "fully redress" its alleged injury. Exceptions 25. Rather, relying on this Court's equitable apportionment precedents, he asked only whether Florida had presented "clear and convincing evidence" that its requested relief would be "effective" or "meaningful" in redressing its alleged injuries. Report 3, 30-31, 69. Florida's brief presents a crude caricature of the Special Master's decision: far from demanding *certainty*, the Special Master dismissed Florida's claims because the putative benefits were entirely *speculative* in the absence of the Corps participating as a party. And far from being "unprecedented," Exceptions 25, the clear-and-convincing-evidence standard is legally and logically the correct evidentiary standard for evaluating whether a state has established its entitlement to an equitable apportionment.

II. Florida failed to prove that a consumption cap would redress its alleged injuries. The United States made clear in its post-trial brief that because of the Corps' reservoir operations in the Basin, "Apalachicola River flows would be very similar with or without a consumption cap" during times of

drought or low flows—the only period for which Florida claims to have suffered injury. U.S. Post-Trial Br. 17-18. The United States' assessment was "supported by the evidence presented at trial," including uncontested government flow data and analysis done by both Georgia's *and* Florida's experts. Report 48. That evidence showed that, during drought conditions, the Corps offsets increased inflow from the Flint River by decreasing reservoir releases on the Chattahoochee River—resulting in no meaningful increase in flows into Florida. The Special Master specifically credited Georgia's experts and evidence on this point, while specifically discrediting the novel hydrologic "model" Florida crafted for purposes of this litigation.

Florida's attempts to relitigate the evidence presented at a five-week trial are without merit. The Special Master correctly rejected Florida's speculation that the Corps *might* voluntarily exercise its "discretion" to pass to Florida water generated by a consumption cap during periods of drought or low flows. Exceptions 40. The United States itself refuted Florida's position when it declared that, if a consumption cap were ordered by this Court, it would still keep Apalachicola River flows at roughly 5,000 cfs during times of drought. Moreover, the Corps does not have unfettered "discretion" over flows: to the contrary, it must make its water-management decisions within the context of a multitude of federal statutory purposes. Florida cannot overcome those realities by quoting a single sentence in the Corps' Record of Decision, particularly when the Corps was careful to explain in that document that it is not a party to this case, that

it operations are not at issue, and that it would do no more than "review" and "consider" any ruling. *Record of Decision* at 18.

Nor can Florida now shift tactics and try to argue that, even if Apalachicola flows would not materially increase during drought, the Court should nonetheless order relief because a consumption cap would improve conditions during non-drought periods or on the margins of drought operations by reducing the "frequency, duration, and severity of drought operations." Exceptions 46. The Special Master correctly found that Florida "presented no evidence [at trial] assessing the impact of a consumption cap on shortening the Corps' drought operations or on increased pass-through flows during non-drought conditions." Report 65. Indeed, to the extent the record contains any evidence at all regarding the effect of increased flows on shortening drought operations, "that evidence was presented by Georgia and tends to show an absence of any significant benefit to Florida." *Id.*

Despite Florida's pleas for this Court to ignore the operations of the Corps altogether, *see* Exceptions 37-40, the Special Master correctly recognized that those operations are not only relevant but dispositive. This Court has long accounted for the impact of "natural and man-made obstacles" in evaluating whether relief would be effective. *Idaho I*, 444 U.S. at 392. That is especially true where, as here, the "obstacle" in question involves the independent decisions of a third party.

III. Principles of equity fully support the Special Master's recommendation. There is no basis for a

court of equity to award relief that has not been proven to redress an alleged injury. There would be nothing equitable about disrupting the agricultural economy of Georgia, or the water-supply resources of millions of Georgia citizens, on the off-chance that it might (or might not) result in some marginal benefit to Florida. To invoke this Court's extraordinary equitable power, a state must show—at the very least—that the relief requested is highly likely to redress its alleged injury. Because Florida failed to make that showing here, equity does not entitle it to relief.

ARGUMENT

The decisive issue in this case is Florida's assertion that it can obtain effective relief against Georgia alone, despite the dominant role played by the Corps in the "highly regulated" ACF Basin. GX-544 at 2. Florida strategically narrowed its requested relief to a consumption cap on Georgia, betting its case on the proposition that it could prove that a cap alone would afford adequate relief without any change to Corps operations. After 18 months of discovery and a five-week trial, however, Florida failed to meet its burden of proof. Instead, the evidence showed that obtaining a meaningful increase in state-line flows during times of drought could not be achieved solely by reducing Georgia's consumption, but instead would require significant changes to the Corps' water control plans. The United States, participating as *amicus curiae*, agreed. Because the Court lacks power in this case to compel the Corps to change its operations, the Special Master correctly recommended that Florida's request for an equitable apportionment be denied.

I. The Special Master Applied The Correct Legal Standard In Finding That Florida Failed To Prove Its Case

The Special Master applied the correct legal standard in recommending that this Court deny relief. He correctly required Florida to prove, by clear and convincing evidence, that its requested relief would effectively redress its alleged injuries. Florida attacks that legal standard on two grounds, neither of which has merit. *First*, Florida accuses the Special Master of requiring it to prove that relief was "guaranteed" to "fully redress" Florida's injury. Exceptions 25, 29. Any fair reading of his Report makes clear, however, that the Special Master applied no such standard and instead required Florida to prove only that its requested relief was highly likely to yield "meaningful" or "material" benefits. Report 47, 69, 70. *Second*, Florida argues that it should not have been held to the clear-and-convincing-evidence standard. But that standard is well-established in this Court's equitable apportionment jurisprudence, and it plainly applies when evaluating the effectiveness of Florida's proposed relief.

A. The Special Master Correctly Required Florida To Prove Effective Redress

In recommending that the Court deny Florida relief, the Special Master correctly required Florida to prove that its requested relief would effectively redress its alleged injuries. Florida invoked this Court's jurisdiction to compel Georgia, a coequal sovereign, to substantially reduce its water use in the ACF Basin—a request that would negatively

affect millions of people and impose substantial economic harm. This Court fashioned the "federal common law" doctrine of "[e]quitable apportionment" to govern such disputes. *Colorado I*, 459 U.S. at 183. Before the Court will exercise its "extraordinary power" to order an equitable apportionment however, a complaining state must make a number of showings. *Washington*, 297 U.S. at 522. Among other things, a state seeking to alter the status quo through a new diversion of water must prove that the "benefits" of its proposed diversion will "substantially outweigh the harm that might result" to a sister state. *Colorado I*, 459 U.S. at 187.[6]

Weighing the costs and benefits of the requested relief necessarily requires asking whether such relief will effectively redress the alleged injuries. By definition, a state that cannot make such a redressability showing cannot prove that the "benefits" of a proposed apportionment "substantially outweigh the harm" to the other state. *Colorado I*, 459 U.S. at 187; *see also Idaho I*, 444 U.S. at 392; *Washington*, 297 U.S. at 522-23. Because there is no such thing as an equitable apportionment action "to vindicate a barren right," *Washington*, 297 U.S. at 523, this Court will not award equitable relief where a proposed remedy will not provide effective redress.

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[6] A complaining state must also prove (1) that it is suffering "real and substantial injury or damage," *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983) (*Idaho II*); (2) that its injury is caused by a sister state's water use, *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976) (*per curiam*); and (3) that the sister state's water uses are inequitable, *Washington*, 297 U.S. at 523-24.

Prior cases recognize that an equitable apportionment will not be granted where the plaintiff state has failed to prove that its requested relief will effectively redress its alleged injuries. In *Washington v. Oregon*, for example, Washington sought increased flow from the Walla Walla River by asking the Court to curb Oregon irrigators' use of dams to divert water for agricultural use. *See* 297 U.S. at 518-21. But Washington's request ran into a fundamental problem: the water released by removing the dams "would not reach" Washington because the water "would be quickly absorbed and lost in the deep gravel beneath the channel." *Id.* at 523. Because Washington had not proven that removing the dams would provide any "compensating benefit"—let alone one that would outweigh "the long established use in Oregon"—the Court denied relief. *Id.*

Idaho ex rel. Evans v. Oregon, articulated the same principle. Idaho sought an equitable apportionment of anadromous fish that migrated through the Columbia and Snake River System. *See* 444 U.S. at 381-82. The Court held early in the case that the United States was not an indispensable party because Idaho could conceivably obtain a greater share of fish without adjusting the government's operation of dams along the river system. *See id.* at 388-89. The Court could, in theory, "set aside a portion" of the fish harvested by Washington and Oregon, "taking into account the estimable mortality rate at each dam," and potentially increase the total fish migrating back to Idaho. *Id.* at 389. But the Court warned that Idaho's "narrow complaint [was] a two-edged sword."

Id. at 392. If Idaho could not prove that restricting upstream fishing would have an "*appreciable* effect upon the number of [fish] ... arriving in Idaho"—because, for example, "natural and man-made obstacles" like the government's operation of the dams "prevent any additional fish ... from reaching Idaho in numbers justifying" the requested restrictions—Idaho's claim would fail. *Id.* (emphasis added).[7]

By its own admission, Florida placed itself "in the exact same position" as Idaho in *Idaho I*. 6/2/15 Hr'g Tr. 27:2-3. Although the Corps controls flows into the Apalachicola River, Florida sought increased flows by requesting only that the Court reduce Georgia's consumption of water and not impose any obligations on the Corps itself. Like Idaho, Florida's tactic allowed it to "sidestep[]" dismissal at the outset for failure to join the United States, but required Florida to "shoulder the burden" of proving that a consumption cap would actually result in an increase in water flow "in numbers justifying" the requested restrictions. *Idaho I*, 444 U.S. at 392. As counsel for Florida told the Special Master early in this case: "ultimately, if you conclude after a trial that caps on consumption will not redress Florida's

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[7] Idaho was able to establish the existence of a "workable decree" that did not involve the United States and that would ensure a meaningful number of fish made it to Idaho, although Idaho's case ultimately failed because it did not prove injury or inequitable use. *Idaho II*, 462 U.S. at 1026. Florida, in contrast, failed to prove that the Court could fashion effective relief in the absence of the Corps as a party.

harm, then Florida will not have proved its case." 6/2/15 Hr'g Tr. 29:21-30:3.

Applying *Washington* and *Idaho I*'s requirement that "the injury must be redressable by the Court," Report 24, the Special Master correctly examined whether "a consumption cap—the proposed remedy in this case—[would] provide equitable redress for Florida's injury," *id.* at 27. The Special Master found that "Florida has not proven that its injury can be remedied" without "a decree binding the Corps" because the "evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party." Report 30-31. In particular, Florida failed to prove "that any additional streamflow in the Flint River or in the Chattahoochee River would be released from Woodruff Dam into the Apalachicola River at a time that would provide a material benefit to Florida (*i.e.*, during dry periods)." *Id.* at 47; *see also id.* at 68-69 ("Florida's lack of proof, combined with the credible testimony offered by Georgia, leads me to conclude that Florida has not carried its burden to show that it can obtain meaningful redress without a decree that binds the Corps.").

In attacking the Special Master's analysis, Florida repeatedly relies on this Court's statement in *Idaho II* that "[u]ncertainties about the future ... do not provide a basis for declining to fashion a decree." 462 U.S. at 1026; *see* Exceptions 2, 25-26, 30, 34. But that case hardly stands for the proposition that a plaintiff state can obtain an equitable apportionment without proving that the relief sought would redress its alleged injury. *Idaho II* simply acknowledged that equitable apportionments must rely on

"reasonable predictions of future conditions." 462 U.S. at 1026. Such predictions, however, must still be proven by *actual evidence* showing that such future conditions are in fact likely to occur. This Court will not order equitable relief where the benefits are "uncertain," *Washington*, 297 U.S. at 529, or "speculative and remote," *Colorado I*, 459 U.S. at 187. Florida's case failed becaused it did not prove that the Corps was likely to pass through additional water at the times necessary to redress Florida's alleged injury—not because the Special Master failed to make "reasonable predictions of future conditions." Exceptions 30.

Nor did the Special Master require Florida "to show to a *certainty* that a decree in its favor would *fully* redress its injury." *Id.* at 25 (emphases added). Both elements of that assertion are wrong. Taking the second element first, nowhere in his Report did the Special Master purport to require Florida to prove that its alleged injury would be "fully" remediated. Applying the case law discussed above, the Special Master merely asked whether Florida had proven that its requested relief would be "effective," Report 30-31, 35, 46-48, "meaningful," *id.* at 69, or "material," *id.* at 47, 70. Florida failed to make that showing. Indeed, far from proving effective relief, the evidence showed that a consumption cap would *not* result in meaningful benefits to Florida because Corps operations would prevent any material increases in Apalachicola River flows during dry periods.

The Special Master also did not require Florida to prove effective relief to an absolute "certainty." Rather, the Special Master applied a "clear and

convincing evidence" standard, which required Florida to prove "that the truth of its factual contentions [was] *'highly probable.'*" Report 28 (emphasis added) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (*Colorado II*)). While that is justifiably a demanding standard, it falls short of requiring total certainty of proof. And, as explained further below, the clear-and-convincing-evidence standard was the legally appropriate standard to apply under this Court's decisions in *Colorado I* and *Colorado II*.

Florida makes much of the Special Master's single use of the word "guarantee" on the penultimate page of his Report. *See* Report 69 ("There is no guarantee that the Corps will exercise its discretion to release or hold back water at any particular time."). Seizing on that single word, Florida claims—no fewer than 17 times—that the Special Master required Florida to prove that the Corps was "guaranteed" to pass any conserved water through to the Apalachicola River. *See, e.g.*, Exceptions 1, 19, 24. In context, however, the Special Master used the word "guarantee" not to describe the evidentiary standard he was applying, but instead to emphasize how the Corps' control over water flows in the ACF Basin rendered any benefits to Florida from a consumption cap highly speculative and uncertain. *See* Report 69. Moreover, reviewing the Special Master's full Report makes clear that he did not require Florida to prove that relief was "guaranteed." Instead, he consistently required Florida to prove only that the evidence of increased state-line flows resulting from a consumption on Georgia was "clear and convincing." *Id.* at 3, 29, 47,

51, 61. Not only did Florida fail to make that showing, but the evidence at trial "tend[ed] to show" the opposite—namely, that any benefit to Florida was unlikely because the Corps' operations would "offset any increased flows" resulting from Florida's proposed cap. *Id.* at 47, 48.

In the end, the Special Master denied relief not because Florida failed to prove its case to a "certainty," Exceptions 25, but because the evidence showed that the potential benefit to Florida of a consumption cap was "uncertain and speculative" in light of the Corps' operations in the ACF Basin. Report 48; *id.* at 56 n.38 (finding that "any release in excess of the mandatory minimum" by the Corps during a drought "is inherently discretionary and therefore uncertain"); *id.* at 63 (finding "the efficacy of any relief speculative"); *id.* at 68 ("[T]he benefits to Florida [of a cap] are likely rare and unpredicable."). In doing so, the Special Master correctly applied this Court's precedents. *See Washington*, 297 U.S. at 522-23; *Idaho I*, 444 U.S. at 392.

B. Florida's Burden Was One Of Clear And Convincing Evidence

Florida asserts that the Special Master erred by applying the clear-and-convincing standard to the effective redress inquiry. *See* Exceptions 34-36. Florida claims that once it has proven "by clear and convincing evidence an injury," the case shifts into equitable balancing and "on *that* question, there is no reason to tilt the scale in favor of Georgia." *Id.* at 35. That argument has no basis in law or logic.

This Court has made clear that because of the interests at stake, the clear-and-convincing standard

applies broadly in equitable apportionment cases and is not limited to proof of injury. In particular, the Court has held that, in "weigh[ing] the harms and benefits to competing states," the state seeking to disrupt the status quo must "demonstrate[] by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result." *Colorado I*, 459 U.S. at 186; *see also Colorado II*, 467 U.S. at 313. If a state seeking a diversion of water like Florida does here must prove by clear and convincing evidence that the benefits of a remedy substantially outweigh the harm, it necessarily follows that such a state must also prove effective redress by that standard. Proving effective redress is, after all, a necessary part of establishing the "benefits" side of the balancing inquiry. *See supra* Part I.A.

The rationales this Court gave for adopting the clear-and-convincing standard also apply as much to the effective redress prong of the equitable apportionment analysis as they do to other elements. *See Colorado I*, 459 U.S. at 187-88. Requiring a plaintiff state to prove that its requested relief is "highly probable" to redress its alleged injuries appropriately accounts for "the unique interests involved in water rights disputes between sovereigns." *Colorado II*, 467 U.S. at 316. The Court has long been "conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved." *Colorado v. Kansas*, 320 U.S. 383, 393 (1943). Before this Court will award any relief in a dispute between states, "the case must be of serious magnitude and fully and clearly proved." *Id.*

That is all the more true in a case such as this, where Florida seeks to upset substantial and longstanding economies in Georgia. The Court has recognized that "the equities supporting the protection of existing economies will usually be compelling." *Colorado I*, 459 U.S. at 187; *see also Colorado II*, 467 U.S. at 316-17. That is so because "[t]he harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote." *Colorado I*, 459 U.S. at 187. Allowing an equitable apportionment only when a state seeking a diversion has proven the existence of effective relief by clear and convincing evidence avoids disrupting such established uses for futile or speculative purposes.

Nor can Florida lighten its burden of proof on redressability in this context by analogy to Article III standing. *See* Exceptions 31-32. Such standing is necessary, but not sufficient, to pursue an original action. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992). On the merits, a state—like Florida—that brings an equitable apportionment action to alter the status quo must prove its case by "clear and convincing evidence." *Colorado II*, 467 U.S. at 316; *see also Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981). It follows that Florida must establish by clear and convincing evidence that the relief it seeks here would effectively redress the injuries alleged. That burden of proof is, of course, far more demanding than the burden applicable to assessing Article III standing in "the ordinary civil case." *Colorado II*, 467 U.S. at 316. Thus, the Article III standing cases cited by Florida—none of

which involve redressability as a merits issue that must be proven by clear and convincing evidence—miss the point.

II. Florida Failed To Prove That A Consumption Cap Would Provide Effective Relief

Applying the clear-and-convincing standard, the Special Master found that "Florida has failed to show that a consumption cap will afford adequate relief." Report 69. That conclusion is amply supported by the record. The United States confirmed in its post-trial brief that, during drought conditions, "Apalachicola River flows would be very similar with or without a consumption cap." U.S. Post-Trial Br. 17-18. And the Special Master found that the United States' position was independently corroborated and "supported by the evidence presented at trial," including uncontested government flow data, modeling and analysis by Georgia's experts, and even modeling and analysis from Florida's own experts. Report 48. Although the "ultimate responsibility for deciding what are correct findings of fact remains with" this Court, "the [Special] Master's findings ... deserve respect and a tacit presumption of correctness." *Colorado II*, 467 U.S. at 317. Florida has provided no basis for second-guessing those conclusions here.

A. Florida's Claims Cannot Be Squared With The United States' Description Of Its Own Reservoir Operations

The United States has confirmed that imposing a consumption cap on Georgia would not have a material impact on flows into Florida during drought

periods. At the Special Master's request, the United States "describe[d] the Corps' current operating procedures" and explained "how the Corps would operate" its reservoirs in response to a hypothetical consumption cap. U.S. Post-Trial Br. 1, 17. Specifically, the United States evaluated an increase in basin inflow of 2,000 cfs—a hypothetical scenario in which the Corps assumed that a cap could generate the maximum flow Florida requested—and explained how its reservoir operating rules would dictate storage and releases of that excess water under various hydrologic conditions.

In responding to the Special Master's request, the United States unequivocally stated: "The Corps expects in an extreme low flow scenario that Apalachicola River flows would be very similar with or without a consumption cap until enough water is stored to return the system to normal operations."[8] *Id.* at 17-18. The United States explained that "if drought operations have begun," even a substantial increase in basin inflow of 2,000 cfs above Woodruff Dam "would generally result in a net increase in storage upstream until drought operations ceased," while the Corps "maintain[ed] flow into Florida of roughly 5,000 cfs." *Id.* at 13; *see also id.* at 2 (confirming that, during drought, "an increase in basin inflow above Jim Woodruff Dam" would result in "no immediate increase of flow into the

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[8] The term "extreme low flow scenario" refers to the Corps' "drought operations." *See id.* at 17 (describing an "Extreme Low Flow" scenario as one where "drought operations have already been triggered").

Apalachicola but additional storage of water in the federal projects"). Thus, even assuming it were feasible for a consumption cap to generate the increased flows Florida seeks—and it is not—the Corps confirmed that such caps would yield no material increase in state-line flows at the times Florida has alleged injury.

The United States further confirmed that it would make no difference whether this additional basin inflow entered the system from the Flint River or the Chattahoochee River. Should an increase in basin inflow of 2,000 cfs come from the Flint River, the United States explained, "the Corps will 'offset' additional basin inflow from the Flint River by storing more water on the Chattahoochee River." *Id.* at 12. The reason the Corps would "offset" an increase in Flint River flows is because "[i]f a consumption cap produced 2,000 cfs of additional flow on the Flint River, ... then the Corps would not need to release [as much] water from storage to meet the minimum flow requirement [at the state line] and would not do so as a matter of course." *Id.* at 17.

Florida maintains that the Court should ignore these statements from the United States' brief, arguing that the brief is not "evidence" and that the Special Master's reliance on it is "misplaced." Exceptions 44. Florida never objected below, however, to the United States filing such a brief or to the Special Master considering it. Indeed, Florida *itself* repeatedly relied on the United States' *amicus* briefs throughout this case, *see, e.g.*, Florida Post-Trial Response Br. 2, 5-7, 9, 11-14, 18, 66 (Dkt. #633), and continues to rely on those briefs in its Exceptions filed before this Court, *see* Exceptions 43,

48. In any event, the United States' interpretation of its reservoir operating rules, like an agency's interpretation of its regulations, is entitled to deference under this Court's precedents—including where, as here, it is advanced in an *amicus* brief. *See Chase Bank USA N.A. v. McCoy*, 562 U.S. 195, 208-211 (2011); *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997).

Florida also selectively quotes from the Corps' recent Record of Decision adopting the new Master Water Control Manual, arguing that a single sentence from that document overrides the Corps' statements in its *amicus* brief and "eliminates any doubt" that the Corps will pass to Florida additional water generated by a consumption cap. Exceptions 2 (citing *Record of Decision* at 18). But the Record of Decision says no such thing, and Florida's selective quotation is misleading at best. The very first sentence of the paragraph Florida quotes states: "With respect to the *Florida v. Georgia* case, [the Corps] will *review* any final decision from the U.S. Supreme Court and *consider* any operational adjustments that are appropriate in light of that decision, including modifications to the then-existing [Manual], *if applicable*." *Record of Decision* at 18 (emphases added). The Corps then goes on to emphasize that: "*However*, [the Corps] is not a party to the case, and [Corps] operations are not at issue in the litigation." *Id.* (emphasis added).

The Record of Decision thus does nothing more than acknowledge the uncontroversial point that, although the Corps is not bound by any decision in this case, it nonetheless will "review" any ruling and "consider" changes to its operations. It cannot be

inferred from that truism that the Corps has somehow committed itself to upending its newly adopted Water Control Manual—the result of nearly ten years of review and revision by the Corps and other federal agencies—in response to a hypothetical judicial order in a case to which it is not a party. Florida certainly produced no evidence, much less clear and convincing evidence, that the Corps would in fact do so. To the contrary, federal legislation would be needed to require the Corps to adjust its operations to comply with an order in this case—a concept that is not novel to Florida, which has acknowledged that an act of Congress was required to compel the Corps to comply with the ACF Compact 20 years ago. Exceptions 42. Absent a similar statutory command, nothing would require the Corps to adjust its operations to comply with an order here.

What is more, the Corps made clear in the Record of Decision that the Water Control Manual *already reflects* its considered judgment of how to "best balance[] the authorized project purposes," JX-124 at ES-16, and "best serve[] the overall public interest" in operating federal reservoirs, *Record of Decision* at 1. The operations detailed in the Manual take into account many of the concerns raised by Florida in this litigation and in prior litigation involving the Corps. JX-124 at 1-15 to 1-17 (noting that Florida's comments on the draft Environmental Impact Statement ("EIS") were "consistent with [Florida's] positions over the litigation history"); *id.* at ES-8 ("The final EIS addresses all comments received during the draft EIS public review period."). Those same operations have also been continually blessed

by the U.S. Fish and Wildlife Service as sufficiently protective of endangered species in Florida. *See* JX-168 at 3. In light of that administrative history, there is no sound basis for speculating (as Florida does) that the Corps would voluntarily choose to alter its operations in response to an order to which it is not legally bound.

In short, Florida's cherry-picked statement from the Record of Decision does not carry the weight that Florida would have it bear. Far more relevant and probative on this point is the United States' post-trial brief, which expressly addresses how the Corps would operate its reservoirs in response to a consumption cap. There, in direct response to a request from the Special Master, the United States confirmed that a cap would not materially change state-line flows during drought. U.S. Post-Trial Br. 17-18.

B. Any Benefit To Florida From A Consumption Cap Would Be "Uncertain And Speculative"

Although the Corps' interpretation of its own Water Control Manual is entitled to deference under existing precedent, the Special Master did not take the United States' word for granted in concluding that a consumption cap would not provide effective relief. Rather, he independently examined the evidence put forth by both States and found that it supported the United States' and Georgia's position, concluding that the "evidence ... tends to show that the Corps' operation of federal reservoirs along the Chattahoochee River creates a highly regulated system over much of the basin, rendering any

potential benefit to Florida from increased streamflow in the Flint River uncertain and speculative." Report 47-48 (quotations and alterations omitted). The trial record strongly supports this finding.

1. The Corps' Practice Is To Offset Flint River Flows During Drought

Based on the evidence presented at trial, the Special Master concluded that the Corps' past practice during drought has been to offset increased flows from the Flint River with reduced reservoir releases from the Chattahoochee River—precisely as the United States describes in its brief. *See id.* Florida's claims to the contrary are unfounded.

The Corps' project data for its reservoirs (*e.g.*, daily recorded inflows and outflows) confirms that the Corps offsets flows during drought. The Special Master found that "historical inflow and outflow data suggests that, during drought operations, the Corps releases less water from ... all of the reservoirs on the Chattahoochee River ... when local inflow at Lake Seminole [from the Flint River] increases." *Id.* at 51 (citing Bedient Direct ¶¶ 149-50 (analysis of Corps project data)). In other words, during drought, an *increase* in flow into Lake Seminole from the Flint River corresponds with a *decrease* in flow into Lake Seminole from the Chattahoochee River. "This confirms that, at least to some degree, the Corps may offset increased inflow from the Flint River by decreasing releases from its reservoirs along the Chattahoochee River." *Id.*

This conclusion is supported by observed flow records maintained by the U.S. Geological Survey for

both the Flint and Apalachicola Rivers. That data shows that, during drought, Flint River flows can increase by thousands of cfs (due to local weather events and rainfall) while at the same time generating no discernible increase in flows into Florida. Bedient Direct ¶ 44. For example, in the extreme drought year of 2012, recorded flows into Woodruff Dam from the Flint River naturally fluctuated by as much as 2,000 cfs. *Id.* Yet the recorded flow in the Apalachicola River immediately downstream of Woodruff Dam did not materially change, instead hovering around 5,000 cfs, the prescribed minimum flow set by the Corps. *Id.*; Tr. 3342:7-3343:19 (Zeng). As the Special Master concluded, this data confirms "that increased streamflow in the Flint River will not necessarily translate into increased streamflow in Florida" during drought. Report 49.

In addition to this objective government data, the Special Master also relied on testimony from two Georgia witnesses: Dr. Philip Bedient, Georgia's hydrology and reservoir expert, and Dr. Wei Zeng, the State's chief hydrologist. Report, 50-51, 58-59. Drs. Bedient and Zeng both concluded that, based on their expertise and experience with Corps operations, the Corps offsets increases in basin inflow and maintains releases of roughly 5,000 cfs into Florida during drought. Bedient Direct ¶ 45 (explaining how "even if reductions in Georgia's water use occurred only on the Flint River during times of drought or low flows, the increase in inflow to Lake Seminole would not necessarily result in any increase in state-line flow into Florida" because any extra flows would be "offset by corresponding

reductions in releases from the reservoirs on the Chattahoochee River"); Tr. 3341:9-3342:6 (Zeng) (explaining that "[w]hen you do have more water coming in from the Flint side," the Corps will "reduce release[s] from the Chattahoochee side so that the combined water going into Jim Woodruff is just 5,000 cfs").[9]

2. The Special Master Found Georgia's Consumption Cap Modeling "Reliable" And Florida's To Suffer From "Critical Shortcomings"

The Special Master also found that reservoir modeling conducted by the parties confirmed his conclusion that a consumption cap would not have a material impact on state-line flows during drought.

To simulate the impact of a consumption cap, Dr. Bedient conducted reservoir modeling using the Corps' official "Reservoir Simulation" model for the ACF Basin ("ResSim"). ResSim is a model built by the Corps' Hydrologic Engineering Center and is used by the Corps to "simulate[] Basin-wide reservoir operations based on the Corps' operating rules and hydrologic conditions." Report 66. "ResSim is 'the

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[9] Although the Special Master cites both Drs. Bedient and Zeng approvingly on the key issues in this case, he noted in passing that Georgia's experts "erred" on a discrete issue: describing releases from Woodruff Dam as "targets," rather than "minimum[s]." Report 54. In fairness, the Corps itself has used both terms to describe the 5,000 cfs figure, *see, e.g.*, JX-124, vol. 2, at 7-6 (referring to "Minimum flow targets"). Ultimately, this semantic distinction is immaterial, since the United States has now confirmed that during drought, the Corps "maintain[s] flow into Florida of roughly 5,000 cfs." U.S. Post-Trial Br. 13.

standard for [Corps] reservoir operations modeling,' and is the 'tool most capable of faithfully representing' reservoir operations" in the ACF Basin. *Id.* at 68 (quoting JX-124 at 4-3, ES-14 n.2; Bedient Direct ¶¶ 65-66). The Corps relied "extensively" on ResSim to develop its Master Water Control Manual. JX-124 at 4-3, ES-14. Florida's own expert, James Barton, touted ResSim as the best available tool for evaluating the Corps' operations in the ACF Basin. Barton Dep. Tr. 130:8-15, 134:2-3. And the Special Master found that ResSim is an "accurate model," Report 68, and "a valid tool for evaluating the impact of increased streamflow from the imposition of a consumption cap as compared to a historical record," *id.* at 67.[10]

Dr. Bedient's ResSim modeling—which the Special Master found "reliable"—showed that even a massive 30% reduction in Georgia's total consumptive use "would lead to virtually no change in state-line flows" during drought. Report 66. "Dr. Bedient also found that an increase of streamflow in the Basin of 1,000 cfs, as Florida suggests is possible, would result in only minimal increases in state-line

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[10] Although the Special Master found that ResSim was "reliable" and "accurate" for assessing the impact of a consumption cap, he found that it is not useful for "predicting" whether the Corps may make "discretionary" releases over 5,000 cfs. Report 60, 68. Latching on to this statement, Florida argues that Dr. Bedient's analysis is "fundamentally flawed" because he used ResSim. Exceptions 50. But as the Special Master correctly found, "the shortcomings identified by Florida are not relevant when ResSim is used for comparative purposes (as Dr. Bedient used it) because any errors are canceled out." Report 67.

flows in critical summer months." *Id.* at 66-67. Florida's chief hydrology expert, Dr. George Hornberger, conducted his own modeling study using ResSim and found virtually the same thing as Dr. Bedient: even "a *fifty percent* reduction in Georgia's agricultural [water] use would not lead to any increased streamflow into Florida for many of the dry months during dry years such as those experienced in 2011 and 2012." *Id.* at 67 n.43 (emphasis added).

After Dr. Hornberger's ResSim analysis yielded results clearly favoring Georgia's position, Florida tasked Dr. Hornberger with creating an entirely new model—one never before used by the Corps or anyone else—to generate a different result. Tr. 1943:21-1944:14 (Hornberger). But Florida's new model was completely unreliable, as it was engineered exclusively to generate results that supported Florida's litigation position. *Id. at* 1949:10-1950:7 (acknowledging that Florida's new model made it "mathematically impossible" to generate a result contrary to Florida's litigation position). Instead of simulating all five reservoirs, like ResSim does, Florida's new model simulated only Lake Seminole, and could only produce a single result—it artificially forced *all* extra water to pass through to Florida. Report 57; Tr. 1945:2-8, 1947:3-21 (Hornberger) (admitting that the "Lake Seminole Model does not and cannot do any type of calculation involving the other four reservoirs in the ACF system"). As a result, the model "does not allow for the possibility that increase[d] flows from the Flint River will be offset by increases in storage on the Chattahoochee River." Report 57. For that reason

and others, the Special Master found that Florida's new model was altogether unreliable and beset by "critical shortcoming[s]" and "predictive anomalies." *Id.* at 56-58.

As the Special Master concluded: "Given the [ResSim] modeling results of Dr. Hornberger, as well as the results reached by Dr. Bedient when he modeled Florida's proposed increase in streamflow of 1,000 cfs," there is "no basis to conclude that a consumption cap will afford Florida effective relief." *Id.* at 67 n.43.

3. Florida Has Admitted That The Only Way To Materially Increase State-Line Flows During Drought Is By Involving The Corps

The Special Master's conclusion that a consumption cap would not generate a material increase in state-line flow during drought is also supported by testimony from Florida's own witnesses and experts.

At trial, Dr. Peter Shanahan, Florida's primary reservoir expert, admitted in response to a direct question from the Special Master that, during drought, the Corps effectively "move[s] water upstream" by offsetting flows on the Flint River with decreased releases from the reservoirs on the Chattahoochee River. Tr. 2552:24-2553:7. Dr. Shanahan also admitted that his own analysis showed no relationship between Flint River flows and Apalachicola River flows during drought, even when Flint River flows increased by as much as 2,000 cfs. Tr. 2512:13-16. In fact, after reviewing Dr. Shanahan's written testimony and observing his

cross examination in court, the Special Master concluded that "Dr. Shanahan's own analysis shows that Basin inflow and local inflow into Lake Seminole can vary by thousands of cfs without affecting observed flows in the Apalachicola River." Report 52.

Florida's hydrology expert, Dr. Hornberger, similarly admitted that a fluctuation of 2,000 cfs in Flint River flows generated "no corresponding increase in state line flows" in Florida. Tr. 1982:21-1985:10. Florida's chief hydrologic modeler for over 15 years also confirmed Georgia's position:

> Q. So under the current [Corps operating plan], even if Georgia decreases its consumptive uses of water, the benefit of increased flows will not reach the Apalachicola River without a change in the operations of the Army Corps of Engineers[?]
>
> A: Yes.

Leitman Dep. Tr. 207:21-208:2 (played at Tr. 4060:6-4065:8). Moreover, James Barton, a Florida reservoir expert who has 30 years of experience in Corps reservoir operations, candidly testified that "because the Corps operates the Woodruff Dam and that's what releases the water into Florida, there would probably need to be some involvement of the Corps" in order to increase flows into the Apalachicola River during drought. Barton Dep. Tr. 204:6-16. When asked whether the Corps would have to be involved to guarantee Florida a reliable or predictable flow above 5,000 cfs during drought, Mr. Barton put a fine point on his answer: "I don't see

how else you would do it." Barton Dep. Tr. 205:14-20.

4. Florida Failed To Prove That The Corps Would Exercise "Discretion" To Pass Along Additional Water From Georgia During Drought

Despite this evidence, Florida nonetheless argues that, if this Court were to order a consumption cap on Georgia, the Corps might voluntarily choose to exercise its "discretion" to pass any water saved to Florida. *See* Exceptions 40-46. That argument fails for a number of reasons.

For one thing, the United States' post-trial brief clearly states that the Corps *would not* release more than the 5,000 cfs minimum during times of drought if additional water were to enter its facilities, including from any consumption cap, but would instead store any excess water in upstream reservoirs. *See supra* Part II.A. That alone is enough to disprove Florida's speculation about how the Corps might exercise its discretion in response to an order in this case. In addition, Florida bears the burden of showing that it is "highly probable" that the Corps will *in fact* exercise its discretion to pass through more water. *Colorado II*, 467 U.S. at 316. It is not enough for Florida to speculate, as it does, that the Corps *might* chose to do so.

True, the Special Master did find that the Corps retains some degree of "discretion" in operating the reservoirs, including the ability to release in excess of 5,000 cfs at certain times. But any such discretionary releases are tightly constrained by the Corps' operating rules. As the United States

explained, the Corps will make discretionary releases only "*as necessary* to meet other project purposes, like hydropower generation and flood risk management." U.S. Post-Trial Br. 17 (emphasis added). The Corps thus exercises "discretion" to release more than 5,000 cfs under very specific circumstances, such as releases for dam safety as a result of flash rainfall events. *See, e.g.*, JX-124 at 2-80 (describing the use of discretion for "unplanned" and "emergency deviations," including for "dam safety issues," emergencies, and hydropower, but not for fish and wildlife); Tr. 3339:9-21 (Zeng) (explaining that flows above 5,000 cfs have occasionally occurred based on "local rainstorms that bring unexpected water").

These types of occasional discretionary releases are quantitatively and qualitatively different from the type of open-ended "discretion" Florida speculates the Corps might exercise in response to a decree from this Court—to release thousands of cfs at times when water is scarce and the rules call for conserving reservoir storage. Indeed, nowhere does the Corps claim that it makes "discretionary" releases during drought in order to pass extra water through to Florida. Quite the opposite: during drought, the Corps seeks to achieve a "*net increase in storage* upstream until drought operations cease[]" while keeping flows into Florida at "roughly 5,000 cfs." U.S. Post-Trial Br. 13 (emphasis added); JX-124 at 2-28, 2-33, 2-40 ("Under dry conditions ..., project operations are adjusted to conserve storage in [the reservoirs] while continuing to meet project purposes.").

More fundamentally, there are serious legal obstacles to the Corps exercising its discretion in the manner Florida suggests. The Corps is statutorily required to regulate lake levels and water flows in the Basin to serve a number of federal statutory purposes—only one of which is fish and wildlife conservation. JX-124 at 2-62. If the Corps were to deliberately draw down its reservoirs and release in excess of 5,000 cfs into the Apalachicola River during drought, that would be inconsistent with the Corps' statutory mandate because it would unreasonably favor a single project purpose (downstream fish and wildlife) over all other federal project purposes (such as water supply for over 5 million people). It would also make little practical sense. The Corps' express purpose in having drought operations in the first place is to "conserv[e] reservoir storage as drier conditions develop in the basin." Corps, *Final Environmental Impact Statement* at ES-39 (Dec. 2016) (*Final EIS*), http://tinyurl.com/ybjwga43. And the federal government has already determined that 5,000 cfs is sufficient to protect even the most endangered fish and wildlife in the Apalachicola River. JX-168 at 3.

C. Florida Failed To Prove Meaningful Benefits From Increased Overall Flows

Unable to show that Apalachicola River flows would increase during times of drought, Florida now shifts tactics and argues that a consumption cap would provide meaningful redress (i) *outside* of drought periods, including during normal and wet years and (ii) at the margins of drought operations by reducing the "frequency, duration, and severity of drought operations." Exceptions 46. Those claims

are remarkable because, as the Special Master found, Florida had a complete "lack of proof" on those issues at trial. Report 68-69.

To begin, Florida's witnesses "did not present any evidence that Florida has been harmed by Georgia's water use in 'wet' or 'average' years, much less that a consumption cap in those years would redress any harm to Florida." *Id.* at 63. The Special Master went on:

- "Florida in its trial presentation did not meaningfully advance any claim of harm from non-drought years." *Id.* at 64.
- "Even if there were evidence of harm from other than low-flow conditions, Florida did not provide substantial evidence of the benefits (if any) from increased overall flows." *Id.* at 65.
- "Florida has provided no evidence that a decree in this case could provide an effective remedy during normal (*i.e.*, non-drought) periods." *Id.* at 68.

Florida nowhere addresses these specific findings by the Special Master.

In addition, Florida did not prove the extent to which drought operations would be shortened as a result of the relief requested or the level of benefits such marginal increased flows would afford. As the Special Master found, "Florida did not quantify at trial the benefits from shortened drought operations or increased flows during non-drought operations." *Id.* at 65. Indeed, in the entire five-week trial, "Florida presented *no evidence* assessing the impact of a consumption cap on shortening the Corps'

drought operations or on increased pass-through flows during non-drought conditions." *Id.* (emphasis added); *id.* ("Florida did not provide substantial evidence of the benefits (if any) from increased overall flows."). Having failed to prove this theory at trial—despite having had *years* to compile evidence—Florida cannot advance it now as grounds for overruling the Special Master's findings.

Indeed, the Special Master found that Georgia was the only party to offer evidence on this point—and that evidence showed that it was far more likely that a consumption cap would do little to nothing to shorten drought operations, let alone have any meaningful ecological impact. *See id.* at 65. Dr. Bedient evaluated the extent to which a cap might shorten drought operations and found that, even with a substantial increase in basin inflow, "there would be only minimal increased flows into Florida as a result of pass-through operations or shortened drought operations." *Id.* at 66. The Special Master accepted and adopted Dr. Bedient's analysis, finding that "even to the extent that Florida may receive additional state-line flows as a result of increases in Basin inflow from a cap on Georgia's consumptive water use, the benefits to Florida are likely rare and unpredictable." *Id.* at 68.

D. The Special Master's Consideration Of The Role Of The Corps Was Proper

Finally, Florida argues that the Special Master legally erred by considering the role of the Corps *at all*, "because the possibility that a third party could take action to frustrate or impair a court-ordered remedy is not a basis to find lack of redressability

where, as here, the third party's action is not *required* to secure relief." Exceptions 39. That is wrong as a matter of law and fact.

As part of the equitable balancing process, the Court necessarily examines whether some obstacle might prevent requested relief from effectively redressing an alleged injury. That is the lesson of *Idaho I* and *Washington*. In *Idaho I*, the Court explicitly warned that if "a trial ... demonstrate[d] that natural and *man-made obstacles*"—*i.e.*, Army Corps dams and their operation—would prevent effective redress, then equitable relief may not be available. 444 U.S. at 392 (emphasis added). *Washington* likewise involved an obstacle (natural, in that case) that rendered ineffective Washington's proposal to curb Oregon farmers' use of water from the Walla Walla River. *See* 297 U.S. at 522-23.

It also makes good sense to consider such obstacles as part of the broader equitable balancing framework. When something—a third party's actions, the nature of a riverbed, or a manmade object—stands as an obstacle to the realization of the "benefits" that a plaintiff state claims, those benefits cannot be said to "substantially outweigh the harm" that the proposed restriction will cause. *Colorado I*, 459 U.S. at 187. Florida's argument for ignoring the actions of third parties is thus an especially poor fit in the equitable apportionment context. It also runs counter to other areas of the law that recognize that the independent decionmaking of a third party can pose redressabilitiy problems. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (acknowledging redressability problems can exist when relief "depends on the unfettered choices made by

independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict" (citations omitted)).

Florida's argument also fails on its own terms. The evidence at trial showed, and the Special Master found, that action by the Corps *is* "required to secure relief" for Florida. Exceptions 39. Under the Corps' current operations, a cap would not result in getting more water to Florida during drought or low-flow peirods. Instead, effective relief "would require modification of the rules governing the Corps' reservoir operations and, hence, active participation by the Corps in this proceeding." Report 61-62.

III. Principles Of Equity Support The Special Master's Recommendation

Florida closes its brief with an appeal to general principles of equity. *See* Exception 53. Yet those principles fully support the Special Master's recommendation here.

It is a time-honored principle of equity that a court will not award relief that has not been proven to effectively redress an asserted harm. "A court of equity is not called upon to do a vain thing." *Foster v. Mansfield*, 146 U.S. 88, 101-02 (1892); 30A C.J.S. *Equity* § 15 ("A court sitting in equity will not do a useless or vain thing, and will not require the doing of a vain or useless thing."); 27A Am. Jur. 2d *Equity* § 91 (similar). Indeed, the "axiom of equity that a court of equity will not do a useless thing," *N.Y. Times Co. v. United States*, 403 U.S. 713, 744 (1971) (Marshall, J., concurring), appears throughout this Court's equitable apportionment cases. In

Washington, for example, the Court refused to "bring distress and even ruin to a long-established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right." 297 U.S. at 523. Far from being the "high equity that moves the conscience of the court in giving judgment between states," ordering ineffective relief would be "the summum jus of power." *Id.*

Moreover, Florida mischaracterizes the Special Master's Report when it argues that equity entitles it to relief because the Special Master purportedly "found" injury to Florida and inequitable conduct by Georgia. Exceptions 53. The Special Master expressly declined to reach any issue *other* than the "single, discrete issue" of whether a consumption cap would be effective without a decree binding the Corps. Report 30-31. The Special Master did not resolve any other issue, such as Florida's alleged injury, causation, or the equitable nature of Georgia's upstream water use. And although the Special Master offered some "brief" initial observations on some (but not all) of those matters, *Id.* at 31, he confirmed that "[m]uch more could be said *and would need to be said*" on those other issues if Florida had not failed to meet its burden of proof on effective redress. *Id.* at 34 (emphasis added).

Nor is this case Florida's "last remaining, legal remedy." Exceptions 1. Florida's inability to prove entitlement to relief from Georgia alone reflects the role of the Corps in determining the amount and timing of water that flows into Florida. Florida is not without recourse on that front. Florida participated in the administrative process leading to the Corps' new Master Water Control Manual, and it

is free to challenge the Corps' determinations in federal court. *See Final EIS* ES-7, 1-15, 1-16. Indeed, lawsuits are already underway challenging the Water Control Manual, including by two Florida-based environmental groups arguing that the Corps' operations in the ACF Basin cause ecological harm.

For whatever reason, Florida has chosen not to join the litigation over the new Water Control Manual. Instead, Florida is staking its claim on a "narrow complaint" in this forum that it knew from the beginning was a "two-edged sword," *Idaho I*, 444 U.S. at 392. As Florida acknowledged early in this case, "if you conclude after a trial that caps on consumption will not redress Florida's harm, then Florida will not have proved its case." 6/2/15 Hr'g Tr. 29:21-24. That is precisely what happened.

CONCLUSION

For the foregoing reasons, the Court should accept the recommendation of the Special Master and deny Florida's request for relief.

July 31, 2017

Respectfully submitted,

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